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STATEMENT

A. Charlie Broyles And Bill Colley

Respondent Charlie Broyles and Respondent Lisa Kay Colley's father, Bill Colley,[1] were coal miners. Charlie Broyles worked in the mines of Virginia for five years as a "coal loader" and as a "track man." (B. App. 11a; Broyles In. Dep. of Charlie Broyles, Dep. pp. 5-8; Broyles In. Dir. Ex. 2, Claim Form CM-911a, p. 1; Broyles In. Dir. Ex. 5, Claim Form CM-913, p. 1)[2] Both jobs involved heavy exposure to coal dust. (Broyles In. Dep. of Charlie Broyles, Dep. pp. 6-9; Broyles In. Dir. Ex. 5, Claim Form CM-913, p. 4) Bill Colley worked in the coal mines of Kentucky and West Virginia for at least nine and one-half years, sometimes moving carloads of coal from inside the mine to the outside and sometimes as a machine operator, a job that also involved heavy exposure to coal dust. (B. App. 24a-25a; Colley In. Tr. of Hearing, Tr., pp. 10-11, 16-17)[3]

Bill Colley and Charlie Broyles filed claims for disability benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (1982 & Supp. III 1985) (the "Act"),[4] in 1974 and 1976,

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[1] Bill Colley died in 1986, and his surviving daughter, Lisa Kay Colley, was substituted for him in the court of appeals.

[2] Citations such as "B. App. 11a" are to pages of the Appendix to the Solicitor General's Petition for Writ of Certiorari in No. 87-1095. Citations to record items not in the Appendix have three parts: (a) the item's designation in the "Index of Documents" that the Department of Labor prepares for each case appealed from the Benefits Review Board to a court of appeals (*e.g.*, "Broyles In. Dir. Ex. 2;" "Colley In. Tr. of Hearing"); (b) the name of the record item (*e.g.*, "Tr."); and (c) the relevant pages of that record item (*e.g.*, "Tr., pp. 10-11").

[3] Bill Colley introduced evidence that he had worked in the coal mines for at least twelve and one-half years. (B. App. 24a-25a) However, the administrative law judge who heard his claim found that his "qualifying miner work would not exceed 9.5 years." (B. App. 25a)

[4] The Act began as Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). In 1972, Title IV was amended by and became known as the Black Lung Benefits Act. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 1, 86 Stat. 150 (1972). In their brief on the merits ("Secy. Br."), the federal petitioners (collectively referred to here as the "Secretary") cite the post-1972 amendments to the Act. Secy. Br. at 3 and n. 1.

respectively. (B. App. 4a) Both claimants contended that they were "totally disabled" due to "pneumoconiosis" arising "out of [their coal mine] employment"[5] and were therefore entitled to the benefits the Act provided. 30 U.S.C. § 901(a). After imposing on them the burden to prove their eligibility under the so-called "permanent" regulations at 20 C.F.R. Part 410,[6] the Secretary of Labor denied their claims. (B. App. 9a, 21a) The claimants appealed this denial to the Fourth Circuit, urging that under Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), they were entitled to have their eligibility determined not under the permanent Part 410 regulations but instead under "criteria . . . not . . . more restrictive" than those in the HEW

[5] Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." *Stedman's Medical Dictionary* 1108 (24th ed. 1982). The Act defines "pneumoconiosis" differently as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments, arising out of coal mine employment*." 30 U.S.C. § 902(b) (emphasis added). The statutory definition of "pneumoconiosis" is therefore broader than the medical one in that it includes *all* respiratory and pulmonary impairments arising out of coal mine employment. But the statutory definition is also narrower than the medical one in that it encompasses only conditions arising out of coal mine employment, not other types of work. In the statutory context, therefore, to refer to "pneumoconiosis arising out of coal mine employment" is, strictly speaking, redundant. As does the Secretary, however, we distinguish the existence of the medical disease from the question of whether it arose out of coal mine employment when to do so is clarifying.

[6] All citations to 20 C.F.R. are to the 1987 edition unless otherwise indicated. The numerous citations in this brief to provisions of 20 C.F.R. usually omit the "20 C.F.R." reference. However, when we refer to the two principal regulatory provisions at issue here, we usually call them by their popular names: the "HEW interim presumption" or the "HEW interim regulation" (§ 410.490) and the "DOL interim presumption" or the "DOL interim regulation" (§ 727.203).

interim presumption at § 410.490. (B. App. 3a-5a) Under this provision, claimants who present evidence meeting specified requirements obtain the benefit of a favorable presumption of disability, which shifts the burden to the Secretary to disprove one or more elements of a claim.

As described more fully below, a Fourth Circuit panel unanimously accepted the black lung claimants' contention that the Secretary had applied an unlawfully harsh eligibility standard to their cases. (*Id.* at 1a-6a) Accordingly, the court remanded their cases to the Secretary to make new eligibility determinations under the proper criteria. (*Id.* at 5a-6a) Charlie Broyles and Lisa Colley, seeking to secure the disability benefits Congress intended for them, are now before this Court to defend that ruling.

B. The Black Lung Benefits Act And The Interim Presumptions

"Part B" of the original 1969 statute instructed the Secretary of Health, Education, and Welfare ("HEW") to process claims for black lung disability benefits filed between December 31, 1969 and December 31, 1972 and to pay, from appropriated federal funds, benefits to miners found eligible. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(a), 83 Stat. 793 (1969). "Part C" of the statute instructed the Secretary of Labor to process claims filed after December 31, 1972. *Id.* at § 422, 83 Stat. 796. These claims were to be paid by the miner's coal mine employer, *id.* at § 422(b), 83 Stat. 796, or if no coal mine employer could be identified due to insolvency or bankruptcy, then from federal funds. *Id.* at § 424, 83 Stat. 798.

HEW approved almost fifty percent of the black lung benefit claims it adjudicated in the first three years of the program. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972). Congress concluded, however, that this approval rate was too low, asserting its concern that, "as provided by Congress in 1969 and as interpreted by the Social Security Administration, the provi-

sions authorizing benefits for total disability due to pneumoconiosis do not in fact benefit countless miners and their survivors who were the intended beneficiaries of the Black Lung program." *Id.* Congress recognized that deserving miners were being denied benefits because the "state of the [medical] art" was inadequate to ensure medical diagnoses of either disease or disability in many miners who were in fact "severely . . . impaired" from pneumoconiosis. *Id.* at 9. The lack of adequate medical facilities in the coal mine areas to perform diagnostic testing compounded the difficulties many miners faced in establishing the required medical proof. *Id.* at 18. Disturbed that HEW had not adjudicated a large volume of claims that miners had filed, Congress attributed the backlog to deficiencies in testing procedures and facilities that made both proof and adjudication of claims more time consuming and difficult. *Id.* at 23.

Because of its dissatisfaction with the low claims approval rate and the backlog of claims, Congress amended the Act in 1972 to make establishing eligibility easier. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).[7] In addition, the Senate Labor and Public Welfare Committee expressed its expectation that HEW would "adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims." S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). HEW responded to these amendments and the Committee's expecta-

[7] For example, Congress redefined "total disability" so that a claimant no longer had to prove that he was physically disabled from performing *any* job, but could establish eligibility if he could show that he was unable to engage in his usual coal mine work or comparable work. Pub. L. No. 92-303 at § 4(a), 86 Stat. 153 (amending Section 402(f) of the Act). Congress also provided that a benefit claim could no longer be denied solely on the basis of an x-ray read as "negative" for pneumoconiosis. *Id.* at § 4(f), 86 Stat. 154 (amending Section 413(b) of the Act).

tion by promulgating the HEW interim presumption at § 410.490. § 410.490(a).

Under the HEW interim regulation, a claimant could invoke a rebuttable presumption that he was "totally disabled due to pneumoconiosis" if he submitted certain specified types of evidence. As relevant here, a claimant could invoke this presumption if he proved both that he had pneumoconiosis (through x-ray, biopsy, or autopsy evidence) and that his pneumoconiosis arose out of coal mine employment. §§ 410.490(b)(1)(i), 410.490(b)(2). A claimant could meet the latter requirement, proof of disease causation, in two ways: either by introducing direct evidence of disease causation or by invoking a separate, special presumption of disease causation through showing that he had ten years of coal mining experience. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456). Once the main presumption was invoked, the burden of proof shifted to the Secretary to show that the claimant was not "totally disabled." § 410.490(c).

Under the original 1969 Act, only HEW had the authority to promulgate regulations governing the determination of eligibility. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(b), 83 Stat. 793 (1969). The 1972 amendments kept this arrangement even for the Part C claims filed after July 1, 1973 for which the Secretary of Labor had processing responsibility. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).[8] While HEW applied the burden-shifting interim presumption to Part B claims, it did not authorize DOL to apply the presumption to Part C claims. § 410.490(a). Instead, HEW required DOL to adjudicate its claims under the Part 410 "permanent" regulations, *see id.*, adopted the same day as the HEW interim presumption. 37

[8] The 1972 amendments to the Act postponed the commencement of the Secretary of Labor's jurisdictional responsibility under Part C from January 1, 1973 to July 1, 1973. Pub. L. No. 92-303, § 5, 86 Stat. 155 (1972).

Fed. Reg. 20641 (1972). Unlike the HEW interim presumption, the permanent regulations did not offer the claimant any opportunity to invoke a presumption of "total disability" that would shift the burden of proof to the Secretary or to the coal mine operator. §§ 410.401-410.476. Rather, a claimant was required to prove affirmatively every element of his claim: that he was (a) totally disabled, (b) by pneumoconiosis, (c) arising out of coal mine employment. §§ 410.422-410.426, 410.414, 410.416.

The distinctions between the liberal HEW interim presumption applied to Part B claims and the strict permanent regulations applied to Part C claims generated dramatically different approval rates for Part B and Part C claims. As the Part B "claims approval rate increased, Labor's remained low." *Mullins Coal Co.* v. *Director, O.W.C.P.*, 108 S. Ct. 427, 437 (1987).[9]

Evidence presented to Congress in the years after the initiation of the Part C program demonstrated the persistence of the

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[9] DOL, operating under the Part 410 permanent regulations, approved less than ten percent of the claims it adjudicated prior to the 1978 amendments. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 873 n. 14 (1981). HEW, in contrast, operating under its interim presumption, approved seventy percent of the claims it adjudicated by 1976. Speech by Robert D. McGillicuddy, Assistant to the Staff Director of the House Subcomm. on Labor Standards Before the Legal Staff of the Benefits Review Board (Sept. 26, 1978), *reprinted in* House Comm. on Education and Labor, 96th Cong., 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, 1236 (Comm. Print 1979); *see also* Letter from William J. Kilberg, Solicitor of Labor, to John B. Rhinelander, General Counsel, HEW (September 13, 1974) [hereinafter "DOL Solicitor Letter"], *reprinted in* H.R. Rep. No. 151, 95th Cong., 1st Sess. 17 (1977) ("[M]any of those claimants who can meet the interim criteria, but not the 1969 criteria are, in fact, totally disabled and should be entitled to benefits.")

problems that had led to promulgation of the HEW interim presumption—deficiencies in medical test procedures and an insufficient number of adequate medical testing facilities. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15 (1977). *See Mullins*, 108 S. Ct. at 436. To several congressmen, these problems explained why DOL had denied benefits to so many of their constituents, even though the congressmen, having personally observed that these claimants had substantial breathing difficulties, believed that they were totally disabled. *See, e.g., Black Lung Benefits Reform Act of 1975: Hearings on H.R. 7, H.R. 8, and H.R. 3333 Before the Subcomm. on Labor Standards of the House Comm. On Education and Labor*, 94th Cong., 1st Sess. 144 (1975) [hereinafter *1975 Hearings*] (remarks of Rep. Perkins); 122 Cong. Rec. 4978 (1976) (remarks of Rep. Daniels). Finally, like HEW previously, DOL developed a large claims backlog requiring claimants to suffer long delays in the processing of their claims. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 251 (1977) [hereinafter *1977 Benefits Provisions Hearings*] (testimony of Donald Elisburg, Assistant Secretary of Labor). Legislators expressed dismay over these delays. *E.g., id.* at 231 (testimony of Rep. Ertel).

Just as the low HEW claims approval rate had prompted legislation in 1972 to increase approvals in the Part B program, the much lower DOL approval rate prompted new legislative proposals to achieve the same end under the Part C program. In particular, representatives from coal mining states introduced a series of bills between 1975 and 1977 to require the Secretary of Labor to apply the HEW interim presumption to all claims. *See* pp. 28-29 and n. 28 *infra*. Such measures sought to cure the low approval rate under the Part C program by the same means (the HEW interim presumption) that HEW had developed in response to Congress' earlier dissatisfaction with the approval rate under the Part B program. The bill the House eventually passed, H.R. 4544, proposed to amend the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973 [i.e., than those applicable under the HEW interim presumption.]

H.R. 4544, 95th Cong., 1st Sess. § 7 (1977).

A conference committee considered H.R. 4544 together with a Senate bill that sought to address the problems leading to the low approval rate by requiring the Secretary of Labor, to whom it granted rulemaking authority, to establish new "criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners." S. 1538, 95th Cong., 1st Sess. § 2 (1977). The conference committee's compromise effectuated the measures of both houses, but for different claims depending on their filing dates. The Senate measure was enacted as Section 402(f)(1)(D) and would govern claims filed *after* the effective date of the new regulations prescribed in the Section. 30 U.S.C. § 902(f)(1)(D).[10] The House measure was enacted as Section 402(f)(2) of the Act and governed all claims filed *before* the effective date of the new regulations, including all pending claims as well as all previously denied claims which were to be reopened. 30 U.S.C. §§ 902(f)(2), 945.[11]

The DOL promulgated its own interim presumption at § 727.203, 43 Fed. Reg. 36818 (1978), as its response to the Act's mandate at Section 402(f)(2) to adjudicate claims under "criteria . . . not . . . more restrictive than the criteria applicable to a claim" adjudicated under the HEW interim presumption. 30 U.S.C. § 902(f)(2). The DOL interim presumption contains

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[10] These new regulations were eventually promulgated at 20 C.F.R. Part 718, effective March 31, 1980. 45 Fed. Reg. 13678 (1980).

[11] In 1978, Congress also created the Black Lung Disability Trust Fund. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)(1), 92 Stat. 12 (1978). This fund is responsible for all claims (1) when the last mine employment was prior to January 1, 1970, (2) when the claims were denied prior to the 1978 amendments but were granted after review under those amendments, or (3) when a responsible coal mine operator cannot be found. 30 U.S.C. § 932(j).

some criteria that are not more restrictive than those of the HEW interim presumption.[12] However, with respect to miners able to prove they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence), the DOL presumption is more restrictive than the HEW presumption. Under the DOL interim regulation, such miners trigger the presumption only by proving that they worked in the coal mines for at least ten years. § 727.203(a)(1). In contrast, under the HEW interim regulation, such miners trigger the presumption *either* by proving at least ten years of coal mining experience, § 410.490(b)(2) (incorporating §§ 410.416(a) and 410.456(a)), *or* by proving that their pneumoconiosis arose out of coal mine work. § 410.490(b)(2) (incorporating §§ 410.416(b) and 410.456(b)). Thus, the DOL interim regulation fails to give claimants the option that the HEW interim regulation affords them—the ability to invoke a presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment. Claimants unable to trigger the presumption under the DOL regulation, even if they might have invoked the presumption under the HEW interim regulation, are forced to proceed under the strict permanent regulations. § 727.203(d).[13]

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[12] Indeed, the DOL presumption is less restrictive to miners than the HEW presumption in a few respects. For example, the HEW presumption may be triggered only by an x-ray, biopsy, autopsy, or set of ventilatory studies meeting specified requirements. § 410.490(b)(1). The DOL presumption may be triggered by any of those types of evidence and also by any of three other types of evidence meeting specified requirements—a set of blood gas studies, a physician's opinion, and, where the miner is deceased, a lay affidavit of his physical condition before death. § 727.203(a).

[13] The permanent regulations under which such claimants are forced to proceed are those set out at 20 C.F.R. Part 718 "as amended from time to time." § 727.203(d). When the "new" permanent regulations at Part 718 became effective on March 31, 1980, 45 Fed. Reg. 13678 (1980), respondents Broyles' and Colley's claims were awaiting administrative hearings. Accordingly, the Secretary should have applied these regulations to their claims instead of the permanent

C. This Litigation

Charlie Broyles and Bill Colley were among the many miners whose claims the Secretary denied by applying only the strict permanent regulations to their claims after finding that they worked less than ten years in the mines. (B. App. 8a, 20a)[14] And, like other such miners, the evidence they introduced would have been sufficient to invoke a presumption of eligibility under "criteria . . . not . . . more restrictive than the criteria applicable" under the HEW interim regulation.[15] Invoking the presumption would have shifted the burden to the Secretary for rebuttal. §§ 410.490(b), 410.490(c). In contrast, under the permanent regulations, which the Secretary applied to their claims, respondents Broyles and Colley bore the burden of

Part 410 regulations. *Strike* v. *Director, O.W.C.P.*, 817 F.2d 395, 406 and n. 9 (7th Cir. 1987). However, this error is irrelevant in the current posture of the cases because the Part 718 regulations, like the permanent Part 410 regulations, contain no presumption of "total disability" that is applicable to any miners with less than ten years of coal mine experience.

[14] Our fellow black lung respondents in Nos. 87-821 and 87-827 represent a proposed class of miners whose claims were denied for the same reason but are no longer pending. In addition to the Secretary, the petitioners in these two cases include four coal companies and two insurance companies (the "private petitioners"). We refer to their brief here as "Priv. Br."

[15] In Mr. Broyles' case, the administrative law judge found both that he had pneumoconiosis and that the pneumoconiosis arose out of coal mine employment. (B. App. 15a-16a) These findings satisfy §§ 410.490(b)(1)(i) and 410.490(b)(2), respectively, and therefore would invoke the HEW interim presumption as a matter of law.

The evidence in Mr. Colley's case is also sufficient to invoke the HEW interim presumption. A board-certified radiologist read the more recent of two x-rays positive for pneumoconiosis (B. App. 25a); and the report of the physician who examined Mr. Colley most recently concluded that his pneumoconiosis arose out of coal mine employment. (*Id.* at 27a)

proving affirmatively that they were "totally disabled" and that such disability arose out of coal mine employment (i.e., disability causation). §§ 410.422-410.426.

The claimants took separate appeals from the final administrative decisions denying them benefits. The Fourth Circuit, after consolidating the two cases, reversed each of the Benefits Review Board's decisions on the ground that the "ALJ erred in failing to evaluate the claims under the [HEW interim presumption]." (*Id.* at 2a) The court concluded that Section 402(f)(2) of the Act offered a "clear mandate" for application of the "liberal [HEW] interim presumption" to the claims before it. (*Id.* at 5a) It rejected the Secretary's argument that she need apply to these claims only "medical criteria" not more restrictive than those in the HEW interim presumption. (*Id.*)[16] The Secretary's petition for rehearing *en banc* was denied. (B. App. 29a)

SUMMARY OF ARGUMENT

A. In Section 402(f)(2) of the Act, Congress required the Secretary of Labor to adjudicate certain claims, including those of respondents Broyles and Colley, using eligibility criteria "not . . . more restrictive than the criteria applicable to a claim" under the HEW interim regulation. The black lung claimants interpret that mandate to require the Secretary to apply to their claims *all* criteria that in combination establish "total disability" under the HEW interim regulation. They submit that the DOL interim presumption, which is the Secretary of Labor's response to Section 402(f)(2), is not faithful to the Section's mandate because it deprives black lung claimants who can prove they have pneumoconiosis (by x-ray, biopsy, or

[16] Unlike the Eighth Circuit in Nos. 87-821 and 87-827, the Fourth Circuit had no occasion to address any remedial question involving the applicability of its ruling respecting Section 402(f)(2) of the Act to a class of claimants. For this reason, respondents Broyles and Colley address only the substantive Section 402(f)(2) issue in this brief, and not the related remedial issues presented in Nos. 87-821 and 87-827.

autopsy evidence), § 410.490(b)(1)(i), of a right that the HEW interim presumption affords them—the ability to trigger a presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416(b), 410.456(b)). The Secretary proffers an erroneous interpretation of the statute under which the term "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). In her view, Section 402(f)(2) required her only to apply "all appropriate medical tests" of the HEW interim presumption, and the DOL interim presumption does that. The private petitioners make similar erroneous contentions.

B. Section 402(f)(2) does not use the word "medical" (or any variant of "medical") to modify the term "criteria." This fact refutes the position of the Secretary and the private petitioners that Congress was referring only to "medical tests" or "medical criteria" and thereby provides strong textual support for the black lung claimants' interpretation of the statute. So does the preceding provision, Section 402(f)(1)(D), in which Congress did modify the term "criteria" by following it with the restrictive clause "for all appropriate medical tests . . . which accurately reflect total disability in coal miners." 30 U.S.C. § 902(f)(1)(D). That textual dichotomy is pivotal, for "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted). The reason that Congress would not have used the word "criteria" in Section 402(f)(2) to mean the same thing as the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D) is that the two sections have entirely different functions under the statute. Moreover, the Act is replete with express cross-references from one section to another, a drafting pattern that contradicts the Secretary's notion that Section 402(f)(2) implicitly refers to Section 402(f)(1)(D).

C.1. The completely independent legislative lineages of Sections 402(f)(1)(D) and 402(f)(2) establish that Congress never intended the latter provision to refer to the former.

2. The legislative history includes statements about the measures that became Section 402(f)(2) in which the speakers used the word "medical" to modify the word "criteria," "standards," or "regulations." Although the Secretary and the private petitioners contend that such references support their position, they do not. Legislators and others used these words as terms-of-art to mean all criteria necessary to prove eligibility, not merely criteria that are strictly medical. Moreover, the legislative history includes other statements about the same measures in which the speakers used the word "criteria" or "standards" without any modification at all. Because these references, by their terms, do not limit the ambit of the term "criteria" to medical criteria, they support the black lung claimants' position. In any event, the respect in which the DOL interim presumption is more restrictive than the HEW interim presumption—proof that the miner's pneumoconiosis arose out of coal mine employment—*is* a "medical criterion."

3. Although the HEW interim regulation enabled miners with less than ten years mining experience to trigger the presumption of disability, the Secretary says that evidence presented before enactment of the 1978 amendments persuaded Congress that miners with less than ten years of mining experience rarely contract black lung disease. This argument is wholly insubstantial for several reasons, including the fact that the only evidence from the legislative history on which the Secretary relies contradicts her position.

D. The clarity of the statutory language and the support the legislative history lends claimants' interpretation of Section 402(f)(2) make deference to the Secretary's interpretation of the statute inappropriate. Furthermore, Congress expected that in interpreting the 1978 amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner."

S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). This directive, to which the Department of Labor has bound itself, § 718.3(c), requires the Secretary to adopt the black lung claimants' reasonable interpretation of the statute.

E. The private petitioners' contention that a court is without authority to direct the Secretary to apply the HEW interim presumption because she has never published it in accordance with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (the "APA"), is meritless. With respect to the claims subject to Section 402(f)(2), the HEW interim presumption is not a "rule" at all. Rather, because Congress incorporated it in Section 402(f)(2), it gained the force and effect of a statute, which is not subject to the rulemaking provisions of the APA. 5 U.S.C. §§ 551(1)(A), 551(4).

ARGUMENT

THE DOL INTERIM PRESUMPTION FAILS TO IMPLEMENT THE MANDATE OF SECTION 402(f)(2) OF THE ACT, AND TO ENFORCE THAT MANDATE A COURT MAY DIRECT THE SECRETARY OF LABOR TO APPLY THE HEW INTERIM PRESUMPTION

The question in this case is whether the DOL interim presumption at 20 C.F.R. § 727.203 is faithful to Section 402(f)(2) of the Act. Four of the five courts of appeals to have addressed the question and the respondent black lung claimants say it is not; the Secretary of Labor and the private petitioners say it is. The resolution of the controversy turns on the meaning of Section 402(f)(2), which provides that "[c]riteria applied by the Secretary of Labor in [certain claims] . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2).

The terms of the debate are by now well defined. All parties agree that the class of claims to which Section 402(f)(2) applies are the claims pending or to be reopened under Section 435 of the Act, 30 U.S.C. § 945, as well as the "new" claims filed before the Secretary promulgated new permanent eligibility regulations pursuant to Section 402(f)(1). Secy. Br. at 7; Priv.

Br. at 21. All parties also agree that the phrase in Section 402(f)(2) beginning "not . . . more restrictive" means that the "criteria" the Secretary is to apply must be at least as favorable to the individual black lung claimant as the "criteria" of the HEW interim presumption at § 410.490. Secy. Br. at 7, 17-18; Priv. Br. at 22. In this context, the dispute between the black lung claimants, on the one hand, and the combined forces of the Secretary of Labor and the coal and insurance industries, on the other, has centered on *which* "criteria" Congress was referring to in Section 402(f)(2).[17] *See Broyles* v. *Director, O.W.C.P.*, 824 F.2d 327, 329-30 (4th Cir. 1987); *Kyle* v. *Director, O.W.C.P.*, 819 F.2d 139, 142-43 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3463, 3484 (U.S. Jan. 12, 19, 1988) (Nos. 87-1045, 87-1065); *Strike* v. *Director, O.W.C.P.*, 817 F.2d 395, 400 (7th Cir. 1987); *Coughlan* v. *Director, O.W.C.P.*, 757 F.2d 966, 968 (8th Cir. 1985); *Halon* v. *Director, O.W.C.P.*, 713 F.2d 21, 24 (3d Cir. 1983) ("*Halon II*"), *reinstating* 713 F.2d 30, 31 (3d Cir. 1982) ("*Halon I*").

The Secretary's current position is that the "criteria" referred to in Section 402(f)(2) are "all appropriate medical tests" in the HEW interim presumption. Secy. Br. at 15, 22.[18]

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[17] The Secretary misframes the inquiry when she initially suggests that the dispute among the parties concerns the meaning of the word "criteria" itself. Secy. Br. at 17 and n. 15. She accentuates the misfocus by concluding that the term is ambiguous. *Id.* The word "criteria" is not ambiguous. While Congress did not define it in the statute, Congress is assumed to use words in their ordinary way. *Richards* v. *United States*, 369 U.S. 1, 9 (1962). The ordinary meaning of "criteria" is the one the Secretary ascribes to it: a "standard on which a judgment or decision is based." Secy. Br. at 17 n. 15 (citing *Webster's New Collegiate Dictionary* 307 (1983)). Using the Secretary's definition, the question here may properly be understood as asking what were the particular "standards" Congress had in mind in Section 402(f)(2), not what the term "standard" means.

[18] The Secretary also frequently asserts that the term "criteria" in Section 402(f)(2) refers to the "medical criteria" in the HEW pre-

The private petitioners' position is that the "criteria" referred to in Section 402(f)(2) of the Act are "the medical bases for invocation [of the HEW interim presumption.]" Priv. Br. at 22. The black lung claimants' understanding of the statute is that the "criteria" referred to in Section 402(f)(2) are *all* the criteria in the HEW interim presumption that in combination establish "total disability."

The claimants' understanding of the statute is correct. The language of Section 402(f)(2), *see* § B *infra*, and its legislative history, *see* § C *infra*, each require that conclusion. While the Secretary and the private petitioners appeal to the deference ordinarily paid to the Secretary's construction of the Act, no such deference is owing here. *See* § D *infra*.

A. The DOL Interim Presumption Is More Restrictive Than The HEW Interim Presumption With Respect To A "Total Disability" Criterion

The DOL and HEW interim presumptions both offer the black lung claimant a means of establishing that he is "totally disabled [because] pneumoconiosis prevents him or her from engaging in [his or her usual coal mine work or comparable work]." 30 U.S.C. § 902(f)(1)(A); *see also* §§ 410.490(b), 727.203(a). However, the DOL presumption is more restrictive (i.e., is less favorable to claimants) than the HEW presumption. Specifically, to trigger the DOL presumption, claimants able to prove that they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence) must also prove that they worked in the coal mines for at least ten years. § 727.203(a). In contrast, to

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sumption (Secy. Br. at 14, 17-18, 19, 22 n. 18, 27), a category of criteria which, at least in common parlance, is broader than "medical tests." She uses shifting formulations of her position on the key question in this case because the support she says she finds in the words of the statute bears only on her "medical test" formulation, *see* pp. 22-26 *infra*, while the primary support she says she finds in the legislative history bears instead only on her broader "medical criteria" formulation. *See* pp. 32-39 *infra*.

trigger the HEW presumption, claimants able to prove that they have pneumoconiosis (also by x-ray, biopsy, or autopsy evidence) have a choice: they may prove *either* that they worked in the coal mines for at least ten years, § 410.490(b)(2) (incorporating §§ 410.416(a) and 410.456(a)), *or* that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416(b) and 410.456(b)). Because the DOL interim regulation deprives claimants of the ability to trigger the presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment [hereinafter "proof of disease causation"], that regulation is less favorable to claimants than the HEW interim regulation.[19] Both the Secretary and the private petitioners concede this.

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[19] The Secretary and the private petitioners call the criterion that renders the DOL presumption less favorable to claimants than the HEW presumption the "ten year coal mining requirement" of the DOL presumption. Secy. Br. at 14, 15, 18, 23, 24 n. 19; Priv. Br. at 18, 27 and n. 36, 29. This characterization is inaccurate. As noted in the text, *both* the DOL and the HEW interim regulations allow those claimants able to prove pneumoconiosis (by x-ray, biopsy, or autopsy evidence) to trigger a presumption of "total disability" by proving that they worked in the mines for at least ten years. But the decisive fact is that the HEW regulation provides claimants with an *additional* option for invoking the same presumption that the DOL regulation does not provide—proving that their pneumoconiosis arose out of coal mine employment. The DOL presumption is therefore "more restrictive" than the HEW presumption with respect to the proof of disease causation criterion, not the ten-year coal mining criterion.

The erroneous characterization that the Secretary and private petitioners proffer should not be allowed to deflect attention from the fact that the actual respect in which the DOL presumption is "more restrictive" than the HEW presumption— proof of disease causation —is a "medical criterion." This fact defeats the private petitioners' interpretation of Section 402(f)(2) on its own terms. *See* pp. 37-39 *infra*.

Secy. Br. at 8, 11; Priv. Br. at 11-12.[20]

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[20] The private petitioners point out that the HEW presumption on its face contains only two rebuttal methods by which a claim can be defeated (§§ 410.490(c)(1) and 410.490(c)(2)), whereas the DOL presumption contains not only these same rebuttal methods (§§ 727.203(b)(1), 727.203(b)(2)) but also two additional rebuttal methods (§§ 727.203(b)(3), 727.203(b)(4)). Priv. Br. at 12-13. They therefore conclude that these additional rebuttal methods—which allow them to defeat a claim by showing that the miner's disability did not arise out of coal mine employment or that he does not have pneumoconiosis—are additional respects in which the DOL presumption is less favorable to claimants than the HEW presumption. *Id.* They nevertheless maintain that the DOL presumption complies with the Act. *Id.* at 19-30. The Secretary, however, says that she "does not think that the rebuttal methods set out in HEW's interim regulation were meant to be exhaustive," Secy. Br. at 26 n. 21, and that application of the additional rebuttal methods of the DOL presumption is required by the "command" of Section 413(b) of the Act, 30 U.S.C. § 923(b), that "all relevant evidence shall be considered." Secy. Br. at 26-27.

The black lung claimants agree with the Secretary's position in this respect, especially because the conference committee report on the bill that enacted the 1978 amendments ties this directive of Section 413(b) directly to Section 402(f)(2). H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (for claims subject to Section 402(f)(2) of the Act, the Secretary "shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that* in determining claims under such criteria *all relevant medical evidence shall be considered*" (emphasis added)); *see also* 30 U.S.C. § 901(a) (describing the elements of a claim, which include proof of pneumoconiosis and disability causation). The Sixth Circuit has apparently adopted this rationale in requiring application of all the rebuttal methods of the DOL interim regulation in cases to which the favorable invocation criterion of the HEW interim regulation must be applied. *Warman* v. *Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 258 n. 1 (6th Cir. 1988) (relying on *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985), which held that the "all relevant medical evidence" exception in the conference committee report demonstrates Congress' intent to allow more restrictive rebuttal of the interim presumption in Part C cases than in Part B cases, *id.* at 489-90); *see also* *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n. 2 (6th Cir. 1987). No other circuit has considered whether the Act allows the Secretary to apply the rebuttal provisions of the DOL interim regulation to claims in which she must apply the invocation provisions of the HEW interim regulation. Contrary to the private petitioners' contention (Priv. Br. at 15), this issue was not addressed below or in *Sulyma* v. *Director, O.W.C.P.*, 827 F.2d 922 (3d Cir. 1987).

The Secretary and the private petitioners also contend that if the Act were read to deny coal operators the ability to defeat a claim using the additional rebuttal methods of the DOL interim presumption, the Act would violate the due process clause of the fifth amendment. Secy. Br. at 26-27; Priv. Br. at 30-34. There is no occasion to consider this question, which was not presented below or in the petitions for certiorari. For, as explained in this note, the black lung claimants agree with the Secretary that the Act does authorize her to apply the additional rebuttal methods of the DOL interim presumption in cases to which the HEW interim presumption must be applied.

Moreover, the HEW presumption makes proof of disease causation a criterion for establishing "total disability," the subject of Section 402(f)(2). The claimant triggers a presumption of "total disability" under the HEW presumption only by satisfying a *combination* of criteria—as relevant here, proof of pneumoconiosis (through x-ray, biopsy, or autopsy evidence) combined with proof of disease causation. Put differently, for the black lung claimants here, proof of disease causation is a *sine qua non* of access to the presumption of "total disability" under the HEW presumption; and without access to a presumption of "total disability," claimants are consigned to the so-called permanent regulations, all versions of which have always provided extremely rigorous criteria for proving "total disability" affirmatively. *See* §§ 410.424-410.426, 718.204.[21] Thus,

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[21] The approval rates have always been much higher for classes of claims to which the DOL or the HEW interim presumption has been applicable than for classes of claims to which only a version of the permanent regulations has been applicable. Solomons, n. 9 *supra* at 873; Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 694-95 (1983); *see also* n. 9 *supra*.

the HEW interim presumption ascribes a significance to proof of disease causation that goes beyond the issue of disease causation itself; access to a presumption of "total disability" is dependent on proof of disease causation.[22] The Secretary and the private petitioners are therefore wrong in contending that "total disability" and disease causation are separate issues. Secy. Br. at 18; Priv. Br. at 27 n. 36.

In sum, both the Secretary and the private petitioners acknowledge that the DOL presumption is more restrictive to claimants than the HEW presumption. Moreover, the respect in which the DOL presumption is more restrictive than the HEW presumption is a "total disability" criterion. Thus, in order to avoid Section 402(f)(2)'s mandate, the Secretary and the private petitioners must proffer constructions of Section 402(f)(2) that would exclude from its ambit a particular "criterion" that they acknowledge does make the DOL presumption "more restrictive" than the HEW presumption. The particular construction of Section 402(f)(2) they do advance forces claimants to proceed under the more rigorous permanent regulations. This result is difficult to square with the fact that Congress enacted Section 402(f)(2) precisely to correct "Labor's low claims approval rate" under the permanent regulations. *Mullins*, 108 S. Ct. at 437. The Secretary's interpretation appears to continue the "pattern of unduly strict administration of benefits" that has plagued the black lung benefits program since it began. *Echo* v. *Director, O.W.C.P.*, 744 F.2d 327, 330 (3d Cir. 1984).

[22] Separate from the operation of the HEW interim presumption, the statutory definition of "total disability" at Section 402 (f) encompasses proof of disease causation. Section 402(f)(1)(A) provides that a miner unable to perform his former coal mine work is "totally disabled" only when "pneumoconiosis" is responsible for his impairment. 30 U.S.C. § 902(f)(1)(A). And the term "pneumoconiosis" in Section 402(f)(1)(A) is itself a term whose statutory definition encompasses only diseases caused by coal mine employment. 30 U.S.C. § 902(b). Accordingly, as an element of the statutory definition of "pneumoconiosis," which is itself an element of the statutory definition of "total disability," proof of disease causation is essential to proof of "total disability."

B. The Plain Language Of Section 402(f)(2) Prohibits The Secretary From Applying Any "Total Disability" Criteria—Whether Non-Medical Criteria, Medical Tests, Or Other Medical Criteria—That Are More Restrictive Than Those Of The HEW Interim Presumption

There is "no more persuasive evidence" of Congress' intent in enacting a statute than the "words by which [it] undertook to give expression to its wishes." *United States* v. *American Trucking Assoc'ns, Inc.*, 310 U.S. 534, 543 (1940). Nonetheless, the Secretary and the private petitioners studiously avoid grappling with the language of the Act in any significant way. Secy. Br. at 17-18; Priv. Br. at 21-22 and n. 31. The language of the statute deserves much more attention than they give it. *See Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

As noted above, the Secretary and the private petitioners contend that Congress used the word "criteria" in Section 402(f)(2) to refer only to "medical tests" or "medical criteria." But Section 402(f)(2) does not use the word "medical" (or any variant of "medical") at all. The limitation that petitioners seek to impose on the "criteria" to which Section 402(f)(2) refers is therefore one that finds no support in the words of that provision itself. In contrast, that the term "criteria" is not limited in any way in the Section provides strong textual support for the black lung claimants' interpretation.

Moreover, considering that Section 402(f)(2) is part of the statutory definition of "total disability" in Section 402(f), the most natural reading is that the term "criteria" refers to all criteria that in combination establish such disability, including non-medical criteria as well as medical tests and other medical criteria. To conclude that the word "criteria" in Section 402(f)(2) refers only to some of the criteria germane to "total

disability" divorces the word "criteria" from its statutory anchor.

The meaning of the word "criteria" in Section 402(f)(2) is also informed by the two preceding provisions: Sections 402(f)(1)(C) and 402(f)(1)(D). Section 402(f)(1)(C) requires that the "regulations [defining 'total disability'] shall not provide more restrictive *criteria* than those applicable under [the definition of disability for the social security disability program at] section 423(d) of Title 42." 30 U.S.C. § 902(f)(1)(C) (emphasis added). As in Section 402(f)(2), Congress did not modify the term "criteria" in Section 402(f)(1)(C). In Section 402(f)(1)(D), on the other hand, Congress did modify the term "criteria" by following it with the restrictive clause "for all appropriate medical tests . . . which accurately reflect total disability in coal miners." 30 U.S.C. § 902(f)(1)(D). Thus, twice, in Sections 402(f)(1)(C) and 402(f)(2), Congress *did not* expressly modify the term "criteria," but in Section 402(f)(1)(D), Congress *did* modify the term with a restrictive clause. That textual dichotomy is pivotal. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted).

This principle of statutory construction repudiates what meager support the Secretary and the private petitioners try to draw from the face of the statute. The Secretary states that the word "criteria" in Section 402(f)(2) is "shorthand for the phrase 'criteria for all appropriate medical tests' [in Section 402(f)(1)(D)]." Secy. Br. at 15. The private petitioners do not see such a direct linkage but suggest that since the word "criteria" in Section 402(f)(1)(D) "directly relates to 'criteria for . . . medical tests,'" the word "criteria" in Section 402(f)(2) implies a "reference to medical data or medical standards only." Priv. Br. at 21 n. 31. These interpretations contradict the principle of *Russello* because they proceed from the illogical

assumption that the different language Congress used in the two sections should be accorded a single meaning. The interpretation of the black lung claimants, on the other hand, honors the *Russello* principle because it proceeds from the common sense understanding that when Congress used different words it meant to say different things.[23]

Congress used different words to say different things in Sections 402(f)(2) and 402(f)(1)(D) because the two sections have entirely different functions. One of the respects in which the Secretary's reliance on Section 402(f)(1)(D) is textually selective is that she ignores the language that defines the distinctive function of that Section. The Secretary's position draws on Section 402(f)(1)(D) only for the phrase "criteria for all appropriate medical tests," but the Section actually requires the Secretary to establish "criteria for all appropriate medical tests . . . *which accurately reflect total disability in coal miners.*" 30 U.S.C. § 902(f)(1)(D) (emphasis added). The language of this Section that the Secretary discards demonstrates that the function of the Section was to mandate the creation of medical test standards that, *independently of any other criteria*, would establish whether a miner is disabled.

In contrast, the standards for the medical tests common to the DOL and HEW interim presumptions (x-rays and ventilatory studies) were never designed to "accurately reflect total disability in coal miners." Rather, under the interim presumptions these medical tests are devices that, *in combination with the other invocation criteria*, serve to shift the burden to the opposing party to disprove the miners' disability. *See*

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[23] While the Sixth Circuit in *Kyle* expressly relied on the *Russello* principle in adopting the construction of Section 402(f)(2) that the black lung claimants advance, *Kyle*, 819 F.2d at 143, the Seventh Circuit failed even to consider that principle when, in *Strike*, it became the only court to accept the Secretary's proffered interpretation. *Strike*, 817 F.2d at 401.

Mullins, 108 S. Ct. at 435-38 and nn. 26, 28.[24] Because claims subject to Section 402(f)(2) must be evaluated by "criteria" that are "not . . . more restrictive than the criteria applicable to a claim" adjudicated under the HEW interim presumption, establishing the disability of miners in Section 402(f)(2) claims requires consideration of the interim presumption medical test standards in conjunction with other criteria.

In sum, the functions of Sections 402(f)(1)(D) and 402(f)(2) are entirely different. Section 402(f)(1)(D) mandates the creation of "medical test" standards that, independently of other criteria, *would establish* whether a miner is disabled once the regulations incorporating the medical test standards were eventually published sometime after enactment of the 1978 amendments to the Act. *See* 20 C.F.R. Part 718 (1981). On the other hand, Section 402(f)(2) requires that the claims subject to the Section be adjudicated using "criteria" that existed before June 30, 1973, including medical test standards that *do not establish* whether a miner is disabled *except* in conjunction with other "criteria." In view of the different functions of Sections 402(f)(1)(D) and 402(f)(2), it is hardly likely that Congress would have used the word "criteria" in the latter section to mean the same thing as the words "criteria for all appropriate medical tests" in the former section. *See also* § C.1 *infra* (discussing the independent legislative lineages of Sections 402(f)(1)(D) and 402(f)(2)).

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[24] When the private petitioners repeatedly criticize the HEW interim regulation because its medical test standards do not accurately determine disability (Priv. Br. at 8-9, 23, 31-32), they exhibit their misunderstanding of the operation of that regulation. Whether or not a miner is disabled is ultimately determined using the various rebuttal methods, not using the medical test requirements set forth in the invocation provisions of the regulation. The medical tests for invocation are only presumptive burden-shifting devices. The various rebuttal methods come into operation after the presumption has been triggered under the invocation criteria.

The Secretary's reliance on Section 402(f)(1)(D) is textually selective in another respect that further demonstrates the weakness of her position. While the Secretary contends that Section 402(f)(2) is linked to Section 402(f)(1)(D), she ignores Section 402(f)(1)(C) entirely. But, as noted above, in both Sections 402(f)(1)(C) and 402(f)(2), Congress used the word "criteria" without modification, whereas in Section 402(f)(1)(D) Congress did modify the word "criteria." Moreover, Sections 402(f)(1)(C) and 402(f)(2) both include a "not . . . more restrictive" mandate, while Section 402(f)(1)(D) does not. Accordingly, if Section 402(f)(2) is linked to any prior provision, that provision would be Section 402(f)(1)(C), in which the term "criteria" clearly refers to both medical and non-medical standards. 30 U.S.C. § 902(f)(1)(C) (requiring application of criteria not more restrictive than those applicable under 42 U.S.C. § 423(d), which defines disability in terms of whether a claimant's "impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, *considering his age, education, and work experience*, engage in any other kind of substantial gainful work" (emphasis added)).[25]

Furthermore, if Congress used "shorthand" in Section 402(f)(2) to refer to Section 402(f)(1)(D), then it used a style of draftsmanship it consistently disavowed elsewhere in the statute. The Act, including the 1978 amendments, is replete with express cross-references from one section to another. *E.g.*, 30

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[25] The private petitioners, citing 20 C.F.R. §§ 404.1511(a) and 404.1525, say that "SSA rules employ the term 'criteria' to mean medical guides for total disability." Priv. Br. at 21 n. 31. On that basis, they conclude that Congress must also have understood the term "criteria" in Section 402(f)(1)(C) to refer to "medical data or medical standards only." *Id.* This conclusion is incorrect because the SSA disability program rules, including eligibility rules, also frequently use the word "criteria" to refer to standards other than medical standards. *E.g.*, 20 C.F.R. §§ 404.463(a), 404.1567(a), 404.1569, 404.1574(b), 404.1599(d), 416.121(d), 416.520(b)(4), 416.537(b), 416.553, 416.1161a(b)(2), 416.1202(a), 416.1203, 416.1262.

U.S.C. §§ 902(i); 921(b), (c)(4), (c)(5); 922(a)(3), (a)(4), (a)(5), (b); 923(d); 924(a)(2). Indeed, Section 402(f)(2) itself refers to Section 435; and Section 402(f)(1)(D) refers to Section 402(f)(1)(A). When Congress wanted to subject one statutory provision to another, or require the Secretary to interpret one provision in light of another, it did so expressly, by telling the Secretary in the statute the specific provision it had in mind. This drafting pattern contradicts the Secretary's notion that Section 402(f)(2) implicitly refers to Section 402(f)(1)(D).

Finally, the Secretary also tries to derive support from the fact that Section 402(f)(2) is part of the statutory definition of "total disability" at Section 402(f). She says that "[i]f Congress had intended to require Labor to apply HEW's interim presumption in its entirety, it presumably would have amended the statutory presumption provision, 30 U.S.C. 921(c)(4), to mandate the use of that provision." Secy. Br. at 18.[26] This theory is wrong because it ignores the close relationship between the HEW presumption and the statutory definition of "total disability" in Section 402(f). Section 402(f) has always defined "total disability," and the HEW presumption implemented that definition by enumerating the combinations of criteria—medical tests, other medical criteria, and non-medical criteria—necessary to establish a presumption of "total disability." Both the HEW presumption and Section 402(f) of the Act focus on the facts that must be proven *in order to* establish "total disability." In contrast, the fifteen-year statutory presumption, 30 U.S.C. § 921(c)(4), focuses only on the other facts that are established if a claimant *has already* proven a disabling impairment. Accordingly, when Congress chose to make the HEW presumption a statutory standard, amending the definition of "total disability" at Section 402(f) was the logical way to do so.

[26] Section 411(c)(4), 30 U.S.C. § 921(c)(4), provides, in relevant part: "If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis . . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not . . . have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

C. The Legislative History Of Section 402(f) Supports The Black Lung Claimants' Interpretation Of The Statute

Because the language of Section 402(f) is clear, any consideration of its legislative history should be limited to determining whether there is "clearly expressed legislative intention" contrary to the statutory language sufficient to call into question the "strong presumption that Congress expresses its intent through the language it chooses." *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 n. 12 (1987). In any event, the legislative history supports the black lung claimants' interpretation of the statute here.

1. The Completely Independent Legislative Lineages Of Sections 402(f)(1)(D) And 402(f)(2) Establish That Congress Never Intended The Latter Provision To Refer To The Former

The Secretary argues that Congress intended the term "criteria" in Section 402(f)(2) to refer to the phrase "criteria for all appropriate medical tests" in the preceding provision, Section 402(f)(1)(D). As do the words of the statute, the legislative history decisively refutes this argument. Although both provisions were added to the Act by the 1978 amendments, their completely independent legislative lineages make it clear that Congress did not intend Section 402(f)(2) to refer to Section 402(f)(1)(D).

The 1978 amendments were the product of a conference bill, H.R. 4544, 95th Cong., 2d Sess. (1978). The bill the Senate passed, S. 1538, proposed to amend the statutory definition of "total disability" to provide:

> [The] Secretary [of Labor], in consultation with the Director of the National Institute for Occupational Safety and Health [NIOSH], shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners. . . .

S. 1538, 95th Cong., 1st Sess. § 2 (1977). This language was virtually identical to that which became Section 402(f)(1)(D) of the Act. When promulgated, the new medical test criteria the bill prescribed were to be applied to claims then pending and thereafter filed, but not to claims previously adjudicated. S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977). But that bill contained no provision like the one that became Section 402(f)(2) of the Act.

The bill the House passed, H.R. 4544, proposed to amend the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973.

H. R. 4544, 95th Cong., 1st Sess. § 7 (1977).[27] Section 12 of

[27] Section 7 of H.R. 4544 originated with a proposal by the United Mine Workers ("UMW"). It urged Congress to amend the Act by adding a provision reading:

> The standards for determining whether a miner who filed a claim after July 1, 1973 is totally disabled due to pneumoconiosis shall not be more restrictive than the standards prescribed by the Secretary [of HEW] for evaluating claims filed prior to July 1, 1973.

Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st & 2d Sess. 349 (1973-1974) [hereinafter *1974 Hearings*]. Arnold Miller, President of the UMW, explained the intent of the Union's proposal when he presented testimony urging that the "interim standards established by the 1972 amendments . . . become the permanent standards used . . . in processing black lung claims." *Id.* at 117. The legislative history contains no hint that the Union understood its proposal as one that would require only the application of the interim "medical test" standards or "medical criteria" to black lung claims. The intent of the UMW was obviously to secure for its members the benefit of all the interim presumption eligibility standards, which were decidely more liberal than those of the permanent regulations. *See* pp. 5-6 and nn. 9, 21 *supra*.

H.R. 4544 also provided that the "not . . . more restrictive" mandate would govern the adjudication of all pending claims and the readjudication of all claims previously denied. While the relevant language of Section 7 of the bill was virtually identical to that which became Section 402(f)(2) of the Act, the bill contained no provision even remotely similar to that which became Section 402(f)(1)(D). Thus, the bill contained no phrase like "criteria for all appropriate medical tests" to which the word "criteria" in Section 7 of the bill could have referred.[28]

The conference bill brought together the provisions that became Sections 402(f)(2) and 402(f)(1)(D). H.R. 4544, 95th Cong., 2d Sess. § 2 (1978). But it did so in order to effectuate the conference committee's straightforward trade, the terms of which are apparent on the face of the statute. Both houses of Congress got exactly what they wanted, but for different claims depending on their filing dates. Section 402(f)(1)(D) embodied the Senate's approach, which prevailed as to claims filed after the Secretary promulgated new permanent regula-

[28] Five other bills were introduced in the House before H.R. 4544. The first three, like H.R. 4544, included the provision that became Section 402(f)(2) of the Act but not the provision that became Section 402(f)(1)(D). H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 3333, 94th Cong., 1st Sess. § 3 (1975); H.R. 10760, 94th Cong., 1st Sess. § 7 (1975). The other two bills did include both provisions, but in each bill the provision that became Section 402(f)(2) of the Act *preceded* the provision that became Section 402(f)(1)(D). H.R. 1532, 95th Cong., 1st Sess. § 2 (1977); H.R. 4389, 95th Cong., 1st Sess. § 2 (1977). This order belies any conclusion that the word "criteria" in the provision that became Section 402(f)(2) ever referred to the phrase "criteria for all appropriate medical tests" in the provision that became Section 402(f)(1)(D).

tions including the new "medical test" criteria prescribed by the Section. Section 402(f)(2) embodied the approach of the House, which prevailed for all claims previously denied, all claims then pending, and all claims filed until the Secretary of Labor promulgated new permanent regulations. While the conference bill had to bring the two provisions together in order to effectuate the committee's trade, nothing in the legislative history suggests that Congress brought the provisions together so that one of them could implicitly refer to the other.

2. The Statements In The Legislative History Using The Word "Criteria" Or The Like Support The Black Lung Claimants' Interpretation Of Section 402(f)(2)

a. The Numerous References In Which The Word "Criteria" Or "Standards" Is Used Without Modification Support The Claimants' Interpretation

The legislative history includes statements about the measures that became Section 402(f)(2) in which the speakers used the word "medical" to modify the word "criteria," "standards," or "regulations." Secy. Br. at 20-21 (citing statements); Priv. Br. at 23-25 (same). The Secretary and the private petitioners contend that such references support their position. *Id.* As discussed in § C.2.b *infra*, they do not. In any event, the legislative history includes other statements about the same measures in which the speakers used the word "criteria" or "standards" without ~~any~~ modification at all. Because these references, by their terms, do not limit the ambit of the term "criteria" to medical criteria, they support the black lung claimants' position that Congress did not intend any such limitation of the term "criteria" in Section 402(f)(2).

For example, in urging passage of the conference bill that was enacted, Representative Perkins stated:

> [A]ll of the denied and pending claims subject to review under the legislation will be evaluated according to the *"interim" standards* . . . . With respect to the review responsibility of the Secretary of HEW under the legislation, the *"interim" standards* remain solely applicable, as

> they have in the past under the HEW-part of the program. As for the Secretary of Labor's review responsibility thereunder, the *"interim" standards are exclusively and unalterably applicable with respect to every area they now address*, and may not be made or applied more restrictively than they were in the past. . . .

124 Cong. Rec. 3426 (1978) (emphasis added). These views are entitled to particular respect because Representative Perkins, the senior House member of the conference committee and the floor manager when the bill returned to the House after conference, was the sponsor of the language ultimately enacted as Section 402(f)(2). H. R. 4544, 95th Cong., 1st Sess. (1977). *See North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-27 (1982).

Representative Simon stated in the same floor debate that, with respect to the claims subject to the provision that became Section 402(f)(2), the Secretary of Labor could "not prescribe *criteria* more restrictive than the social security interim adjudicatory *standards*." 124 Cong. Rec. 3431 (1978) (emphasis added). Similarly, Representative Murphy stated that such claims "will be reviewed in light of all available medical evidence, under *standards* no more restrictive than the 'interim' *standards* issued by the Secretary of Health, Education and Welfare." *Id.* at 3900 (emphasis added). Representative Erlenborn was the leading congressional opponent of reform legislation favorable to black lung claimants. In debates on H.R. 10760, 94th Cong., 1st Sess. (1975), Section 7 of which contained a provision like the one that became Section 402(f)(2), Representative Erlenborn stated:

> Already, the General Accounting Office, in looking over the *criteria* used under Part B, said that the Social Security Administration is using *criteria* more generous and more liberal than the law allows, and this bill would take those *criteria* and establish them as the *criteria* for part C. . . ."

122 Cong. Rec. 4972 (1976) (emphasis added).

The legislative history offers numerous other statements in the same vein, including the statement in the conference com-

mittee's report that DOL must promulgate interim regulations which "shall not provide more restrictive *criteria* than those applicable to a claim [under the HEW interim presumption]." H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (emphasis added).[29] In their number and in the diversity and the authority of the speakers, these statements reinforce the black lung claimants' interpretation that the "criteria" encompassed by Section 402(f)(2) are all the criteria that in combination establish "total disability."

b. The References To "Medical Criteria" And The Like, On Which The Secretary And The Private Petitioners Rely, Actually Support The Claimants' Interpretation

The Secretary's and the private petitioners' reliance on references in the legislative history to "medical criteria" and the like

[29] *See, e.g., 1977 Benefits Provisions Hearings*, p. 7 *supra* at 165 (remarks of Rep. Perkins stating "[t]he coal operators . . . are objecting to the interim standards that are now applicable to Part B being applied to Part C"); *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 142 (1977) (testimony in which Asst. DOL Secretary Elisburg stated "[t]here is some difficulty, however, with the idea of simply adopting the interim standards for part C"); *id.* at 49 (testimony of Arnold Miller, President, United Mine Workers, stating "H.R. 4544, the black lung bill recently reported from the House Education and Labor Committee, provided that the standards for judging claims of miners who filed after June 30, 1973 should be no more restrictive than the standards used to evaluate the claim of a miner who applied on June 30, 1973"); *id.* at 28 (identical testimony of Bedford Bird, M.D., United Mine Workers official); *1974 Hearings*, n. 27 *supra* at 340 (statement of William Worthington, Chairman, Regional Black Lung Association, Coxton, Ky., stating "[s]tandards for miners who filed claims after July 1, 1973 should be no more restrictive than those in force prior to July 1, 1973"); *id.* at 366 (testimony of John Rosenberg, Director Appalachian Research and Defense Fund, stating "[u]nless the Department [of Labor] is instructed to adopt more liberal standards, the interim standards at a minimum, we will return to the early days . . . when in Kentucky, for example, two-thirds of the claims were rejected").

is misplaced. In fact, the references support the black lung claimants' interpretation of Section 402(f)(2).

i. The Secretary contends that the word "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical *tests*" in Section 402(f)(1)(D). Secy. Br. at 15, 22. If the legislative history did contain references suggesting that the word "criteria" in Section 402(f)(2) means "medical tests," they would offer some support for that contention. But the references in the legislative history to "medical *criteria*," "medical *standards*," and "medical *eligibility regulations*" do not offer such support because these categories are broader than "medical *tests*." In the black lung regulatory context, "medical tests" is a category that includes x-rays, ventilatory studies, and blood gas studies, whereas the broader categories of "medical criteria" and the like include not only these medical tests but also such other criteria as proof of disease causation (*see* pp. 37-39, *infra*) and proof of disability causation.[30]

[30] The Secretary cites isolated comments by three witnesses (a practicing attorney, an official of the United Mine Workers, and a minor official of the Department of Labor) to the effect that the differing ventilatory standards is the only respect in which the HEW interim presumption is more favorable to claimants than the HEW permanent regulations. Secy. Br. at 19-20. These comments do not help the Secretary. If Congress had considered these comments significant, the words "ventilatory study standards" would now appear in Section 402(f)(2) instead of the word "criteria." In any event, the HEW interim presumption is also more favorable to claimants than the HEW permanent regulations in respects other than the ventilatory study standards. Indeed, the claimants in this case, who do not rely on ventilatory studies at all, have litigated their claims so extensively precisely because *they* would be treated more favorably under the interim presumption than under the permanent regulations. Their x-ray evidence is sufficient to prove that they have pneumoconiosis, and they are also able to prove that their pneumoconiosis arose out of coal mine employment. Under the HEW interim presumption, they would automatically obtain a presumption that they are "totally disabled" without having to present any ventilatory studies or other evidence concerning the severity of their

ii. The private petitioners contend that the "criteria" to which Section 402(f)(2) refers are "the medical bases for invocation [of the HEW interim presumption]." Priv. Br. at 22. The words of the statute provide no support for this interpretation. Indeed, the private petitioners do not seriously contend otherwise. *See* Priv. Br. at 21-22 and n. 31. Consequently, they (and the Secretary, to the extent her shifting formulations include a similar interpretation, *see* n. 18 *supra*) rely heavily on the isolated references in the legislative history to "medical criteria" and the like. The private petitioners and the Secretary argue first that these references establish that the statutory directive requiring that "criteria . . . not be more restrictive" than the criteria in the HEW interim presumption applies only to "medical" criteria, as distinguished from "evidentiary" or "adjudicatory" criteria. Secy. Br. at 17-22; Priv. Br. at 22-27. They then classify the respect in which the DOL interim presumption is more restrictive than the HEW interim presumption as involving an "evidentiary/adjudicatory" criterion, not a "medical" criterion. *Id.* Both parts of this argument are wrong.

The terms "medical criteria" and the like are terms-of-art. The statements in the legislative history on which the Secretary and the private petitioners rely do not support the contention that the "criteria" to which Section 402(f)(2) refers are medical criteria only. The legislators and others used the words "medical criteria" and similar expressions as terms-of-art to mean all criteria necessary to establish eligibility, a meaning that supports the black lung claimants' interpretation of the statute.

The way in which the legislators and others used the terms "medical criteria" and the like in the legislative history stems from a basic dichotomy in the 20 C.F.R. Part 410 regulations.

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impairments. § 410.490(b). In contrast, under the HEW permanent regulations every claimant is required to prove affirmatively that he is "totally disabled" by presenting evidence (*e.g.*, blood gas studies or ventilatory studies) meeting rigorous standards. §§ 410.422-410.426.

These regulations governed both the Part B and Part C programs prior to the 1978 amendments, and they include the HEW interim presumption at § 410.490. Only subpart D of these regulations governed the determination of eligibility. While the regulations included in subpart D primarily relate to medical criteria, they also include non-medical criteria. *Compare* §§ 410.426(b), 410.430 (medical tests) *and* §§ 410.416, 410.418 (proof of disease causation and disability causation) *with* § 410.426(d) (vocational criteria); *compare also* § 410.422 (entitled "Determining total disability: General criteria") *with* § 410.424 (entitled "Determining total disability: Medical criteria only") *and* § 410.426 (entitled "Determining total disability: Age, education and work experience criteria"). In contrast, the remaining subparts of Part 410 set forth regulations that are not eligibility provisions at all. Rather, they are regulations that govern the processing of claims, including such matters as the duration of benefits for claimants already determined eligible, §§ 410.200-410.216, and the filing of claims. §§ 410.220-410-.223.

The structure of the Part 410 regulations is therefore one in which there is a clear distinction between the eligibility regulations of subpart D, on the one hand, and the processing regulations of the remaining subparts, on the other. The eligibility regulations include principally, though not exclusively, medical criteria, whereas the processing regulations include no medical criteria at all. In this context, it is understandable that the subpart D regulations came to be called the "medical eligibility" regulations notwithstanding the fact that some of the eligibility criteria they include are non-medical.

The committee report on S. 1538, the Senate bill that went to the conference committee, illustrates this point. The report stated that a particular section of the bill:

> does not require nor preclude the blanket incorporation of *any provision* now a part of the existing HEW *medical eligibility regulations (subpart D, 20 C.F.R. Part 410).*

S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977) (emphasis added). The Senate committee thus set forth its understanding

that the phrase "HEW medical eligibility regulations" refers to the entirety of the regulations codified at subpart D of Part 410, not merely to the particular provisions of subpart D setting out strictly medical criteria.

The Solicitor of Labor used the term "medical regulations" in the same way in a 1974 letter to the General Counsel of HEW. There the Solicitor requested HEW to amend the regulations at subpart D of the Part 410 regulations to insert a provision authorizing the Department of Labor to apply the entirety of HEW's interim presumption to Part C claims, concluding:

> It is our firm belief that the only appropriate way to remedy the existing difficulty is for Social Security to amend its *medical regulations* to permit the use of the interim criteria in Department of Labor cases.

DOL Solicitor Letter, n. 9 *supra* at 19 (emphasis added). Accordingly, the term "medical regulations" in the quoted passage referred to all the criteria, not merely the provisions setting out medical tests and other strictly medical criteria.

This usage of the terms "medical criteria" and the like to refer to more than strictly medical criteria under the black lung program has persisted. The Part 727 regulations incorporate the same eligibility/processing dichotomy as do the Part 410 regulations.[31] When the then Secretary of Labor adopted the Part 727 regulations in 1978, he stated:

> [T]he *procedures* contained in Part 725 of this subchapter and not those contained in this part [Part 727] are applicable to the *processing* of [certain] claims. Only the *medical*

[31] The titles of the subparts of Part 727 illustrate the point. *Compare* subpart C ("Criteria for Determining Eligibility for Benefits") *with* subpart A ("General"), subpart B ("Initial Review of Pending and Denied Claims"), subpart D ("Payment of Benefits/Liability"), *and* subpart E ("Special Review Provisions Relating to Claims Pending Before an Administrative Law Judge or the Benefits Review Board").

> *criteria* for determining eligibility with respect to such claims are contained in this part.

43 Fed. Reg. 36825 (1978) (emphasis added). The Secretary used the term "medical criteria" to refer to all the eligibility provisions codified at subpart C of Part 727, including provisions that contain purely medical criteria as well as provisions that contain non-medical criteria.[32]

In sum, such terms as "medical criteria," "medical standards," and "medical eligibility regulations," when used in the legislative history, were terms-of-art. They do not mean what the Secretary and the private petitioners say they mean. Rather, the statements using these terms refer to regulations setting out *all* the criteria necessary to determine a claimant's eligibility, including medical tests, other medical criteria, and non-medical criteria. Consequently, the references, far from providing support for the Secretary's and the private petitioners' interpretation of the statute, support claimants' interpretation instead.

Disease causation is a medical criterion. Even if the references in the legislative history to "medical criteria" and the like were not terms-of-art, but could be read narrowly to include only criteria that are strictly medical, that would not help the

[32] In administering the Title II and Title XVI social security disability programs, the Secretary of Health and Human Services has adopted a similarly expansive use of the term "medical" to refer to all eligibility criteria proving disability, including criteria other than ones that are strictly medical. In recent amendments to the regulations governing the adjudication of social security disability cases, HHS responded to certain comments, stating:

> [F]or purposes of the disability hearing process, we intend *"medical" issues to include* issues which the DDS is empowered to decide under existing regulations, *including "medical considerations" and "vocational considerations."* This same inclusive definition of the term "medical" has been used in Subparts J and N of Parts 404 and 416, respectively, for a number of years. . . .

51 Fed. Reg. 293 (1986) (emphasis added).

Secretary and the private petitioners here. As discussed in § A *supra*, the DOL interim presumption is more restrictive than the HEW interim presumption because, under the DOL version, miners able to prove that they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence) are not allowed to trigger a presumption of total disability by proving that their pneumoconiosis arose out of coal mine employment (i.e., by proving disease causation). The Secretary and the private petitioners label this restrictive criterion an "evidentiary" and/or "adjudicatory" rule. Secy. Br. at 19, 24, 27; Priv. Br. at 22. But such labels cannot be permitted to alter what our common experience and the ordinary meaning of words tell us: the restrictive criterion here—proof of disease causation—is a "medical criterion."[33]

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[33] The private petitioners acknowledge that it is arguable that "'disease causation' is a medical criterion, at least in common parlance." Priv. Br. at 27 n. 36. However, they couple this concession with attempts to evade its consequences. They invoke *Strike* as support for their conclusion that "disease causation is not, in this context, a medical criterion." *Id.* But the *Strike* court reached its conclusion to this effect because it accepted the position that the word "criteria" refers to the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). *See Strike*, 817 F.2d at 401. Thus, to the *Strike* court "disease causation" is not a "medical criterion" because it is not a "medical test." *See id.* at 405. However, this conclusion is wrong because, for the reasons discussed on pp. 22-26 *supra*, the *Strike* court erred by accepting the position that the word "criteria" refers to the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). The private petitioners also say that "'disease causation' in the statute is treated entirely apart from 'disability causation' or total disability." Priv. Br. at 27 n. 36. Even if the statute did treat "disease causation" separately, this would not support the conclusion that "disease causation" is not a "medical criterion." In any case, as explained on pp. 19-20 *supra*, the statute, including the HEW interim presumption as incorporated by Section 402(f)(2), treats these issues as one. Finally, the private petitioners fall back on the deference supposedly owed the Secretary's construction of the statute. Priv. Br. at 27 n. 36. However, as explained in § D *infra*, the Secretary's construction of the statute in this case is not entitled to any deference.

When we feel sick we go to a physician to determine the types of medical conditions that afflict us, and the physician normally must try to determine "disease causation" in order properly to treat the conditions that are diagnosed. Indeed, physicians or other medical professionals are ordinarily the only persons qualified to make these determinations. That is why in personal injury cases plaintiffs must usually introduce a "medical" expert on questions of disease causation. *See, e.g., Hegger* v. *Green*, 646 F.2d 22, 28-29 (2d Cir. 1981).[34] Thus, even if Section 402(f)(2) applies only to medical criteria, the DOL interim presumption fails to comply with the Section's mandate because the respect in which the DOL presumption is more restrictive than the HEW presumption—proof of disease causation—is a medical criterion.

3. The Legislative History Contradicts The Secretary's View That Congress Did Not Wish To Preserve The Ability Of Miners Who Worked Less Than Ten Years In The Mines To Trigger A Presumption Of "Total Disability"

Although the HEW interim presumption enabled miners with less than ten years mining experience to trigger the presumption of disability, the Secretary reads the legislative history to reflect a congressional intention in Section 402(f)(2) *not* "to preserve . . . [that] ability." Secy. Br. at 23. To support this reading, she says that evidence presented before enactment of the 1978 amendments persuaded Congress that miners with less than ten years mining experience rarely contract black lung disease. *Id.* at 23-24.

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[34] What our common and professional experiences tell us, the medical literature on pneumoconiosis confirms. Medical pneumoconiosis has dozens of possible causes. In addition to the inhalation of coal dust, various silicates and metals cause the disease; and only a physician is qualified to determine what the causative agent is. *Cecil Textbook of Medicine* 406-19 (J. Wyngaarden, M.D. & L. Smith, Jr., M.D. 17th ed. 1985).

The Secretary's reading of the legislative history is profoundly flawed. First, the only evidence on which she relies, the report of consultant James Weeks attached to H.R. Rep. No. 151, 95th Cong., 1st Sess. 30-38 (1977), contradicts her position. Citing studies that did show significant x-ray evidence of pneumoconiosis in miners who worked less than ten years in the mines (*e.g.*, *id.* at 36 fig. 4), Weeks suggested that the prevalence of pneumoconiosis was nevertheless underreported because of the inadequacies of x-rays in detecting the disease. *Id.* at 31-32. Weeks considered "more reliable," *id.* at 31, an autopsy study that found pneumoconiosis in greater than sixty percent of the miners who worked less than ten years in the mines. *Id.* at 34 (bar graph).

Second, if Congress believed that miners with less than ten years experience rarely contract black lung disease, it certainly would have considered barring them from eligibility entirely. But the legislative history contains not a hint that Congress ever entertained such an idea. And the Secretary's own permanent regulations, proposed simultaneously with the interim presumption, 43 Fed. Reg. 17732 (1978), and adopted thereafter, 45 Fed. Reg. 13678, 14846 (1980), *do* allow such miners to recover benefits, § 718.203(c), just as HEW's permanent regulations had. §§ 410.416(b), 410.456(b).

Third, the prevalence of pneumoconiosis in miners who worked less than ten years in the mines is irrelevant in any event. A claimant cannot obtain benefits under the HEW interim presumption unless he proves that he does in fact have pneumoconiosis, § 410.490(b)(1)(i), and that it arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456). The legislative history contains no suggestion that Congress would have wanted to deprive those with less than ten years experience who *do* have pneumoconiosis of the availability of the interim presumption even if it were true that many, or even most, other miners who worked less than ten years do not have the disease.

Finally, in support of her position, the Secretary states that DOL incorporated the ten-year statutory presumption at Section 411(c)(1) of the Act, 30 U.S.C. § 921(c)(1), into the DOL interim presumption. Secy. Br. at 23. But the function of the Section 411(c)(1) presumption is not to determine who has pneumoconiosis and who does not. Indeed, it expressly applies only to those who have already proven that they do in fact have pneumoconiosis. Rather, Section 411(c)(1) was designed to help claimants who are unable to prove that their pneumoconiosis arose out of coal mine employment by presuming that fact if they can prove that they worked in the mines for at least ten years. The DOL interim presumption is therefore anomolous. By incorporating the Section 411(c)(1) presumption, the DOL interim regulation provides a presumption of eligibility for many claimants who *are unable to prove* that their pneumoconiosis arose out of coal mine employment. But it fails to provide any assistance whatever for other claimants who *are able to prove* that their pneumoconiosis arose out of coal mine employment.

D. The Secretary's Latest Interpretation Of Section 402(f)(2) Is Not Entitled To Deference

Both the Secretary and the private petitioners vigorously press the contention that this Court should defer to the Secretary's current construction of the statute. Secy. Br. at 27-28; Priv. Br. at 28-30. But no such deference is owing here.

1. The interpretation of Section 402(f)(2) that the Secretary now advances is inconsistent with the construction she made contemporaneously with the statute's enactment. Following enactment of the 1978 amendments, the Secretary promulgated the regulations at 20 C.F.R. Part 727. 43 Fed. Reg. 36818-31 (1978). Section 727.200 of those regulations, entitled "Basis for *criteria*," provided:

> In enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the *criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis* shall be no more restrictive than the criteria applicable to a claim filed with the Social Security

> Administration on or before June 30, 1973, under Part B of Title IV of the Act (the interim adjudicatory rules).

§ 727.200 (emphasis added). The import of this provision, the Secretary's contemporaneous construction of Section 402(f)(2) of the Act, could hardly be clearer: the word "criteria" in Section 402(f)(2) of the Act refers, as the black lung claimants contend, to the set of all "criteria for determining [total disability]" in the HEW interim presumption, not just to medical criteria or some other limited set of criteria. *See also* § 718.1(b).[35]

Even though the Secretary properly construed Section 402(f)(2) in § 727.200 of the Department's regulations, the DOL interim presumption at § 727.203 failed to honor this construction. *See* § A *supra*. The inconsistency between § 727.200 (the DOL's regulatory *construction* of the statute) and § 727.203 (the regulatory *implementation* of the statute) was an unintentional oversight according to Mark E. Solomons, the "principal author" of the Part 727 regulations. 43 Fed. Reg. 17766 (1978).[36]

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[35] The then Secretary of Labor presaged this construction when, immediately after Congress passed the 1978 amendments, he urged the President to sign the bill:

> [W]e were opposed to provisions making the use of the "interim standards" mandatory for the determination of total disability under Part C . . . . While we still believe the "interim standards" are inappropriate, the limitation of their use to reviewed and pending claims in conjunction with the requirement that all other relevant evidence be considered reduces our concerns substantially.

Report on H.R. 4544 from Secy. Marshall to James McIntyre, Director, Office of Management and Budget (Feb. 28, 1978), *quoted in* Solomons, n. 9 *supra* at 895 (full text unavailable).

[36] Mr. Solomons made this clear when, as private counsel, he filed briefs in the *Halon* and *Kyle* cases. In those briefs he stated that, until the Benefits Review Board's 1981 decision in *Lynn* v. *Director, O.W.C.P.*, 3 Black Lung Rep. 1-125 (Ben. Rev. Bd. 1981), in which Judge Miller pointed out that the HEW interim presumption does indeed advantage claimants in a manner that the Labor presumption does not, *id.* at 128-35 (dissenting opinion), no one was even aware of

Given the extreme complexity of the black lung statutory and regulatory scheme, the failure of even DOL officials to recognize the restrictive aspect of the DOL presumption is not surprising.[37] What is surprising is the Department's inaction

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that fact. Joint Brief Amicus Curiae on Behalf of the National Association of Independent Insurers and the National Coal Association at 23, 29, *Halon II* (No. 82-3066); Brief Amici Curiae of Old Republic Insurance Co., Pittston Coal Group and Island Creek Coal Co. in Support of the Respondent's Motion for Rehearing at 1 n.1, *Kyle* (No. 85-3535) (citing incorrectly to *Halon*, which came after *Lynn*).

In 1981, Mr. Solomons wrote an article on the interim presumption, which was based in part on his participation in the drafting on both the 1978 amendments to the Act and the DOL interim presumption. Solomons, n. 9 *supra* at 869 n.*. Numerous statements in the article make apparent his view that Congress intended to give claimants subject to Section 402(f)(2) no less than the full benefit of the HEW interim presumption. *E.g.*, *id.* at 874, 892, 893, 895. There is no hint of a contrary view.

[37] The Secretary and the private petitioners point out that after enactment of the 1978 amendments, the members of the House Committee who reviewed the DOL presumption before its promulgation did not suggest that it was inconsistent with Section 402(f)(2). Secy. Br. at 24-25; Priv. Br. at 25-26. However, if no one was even aware that the HEW presumption advantages claimants in a manner that the DOL presumption does not, these legislators would never have had occasion to consider whether, due to this disparity, the DOL presumption is inconsistent with Section 402(f)(2).

The private petitioners also rely on a subcommittee's failure to find fault with the DOL presumption after it conducted oversight hearings relating to the black lung program in 1981. Priv. Br. at 30. However, in contrast to what the private petitioners suggest, the hearings did not entail a "comprehensive review of eligibility standards," *id.*, but concentrated instead on the financial condition of the trust fund. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. *passim* (1981). Moreover, Judge Miller did not issue his dissenting opinion in *Lynn* until May 1981, only a few months before the subcom-

after Judge Miller's dissenting opinion in *Lynn*, 3 Black Lung Rep. at 128-35. *See* n. 36 *supra*. Faced with a clear inconsistency between § 727.200's construction of Section 402(f)(2) of the Act and § 727.203's implementation of the same statutory provision, DOL could have amended its regulations to resolve that inconsistency. But the Department did not do so then and has not done so yet, though more than seven years have passed since Judge Miller revealed the inconsistency. Instead, the Secretary has intensified the inconsistency by advancing successive inconsistent positions in litigation.

The Secretary set forth the first of the Department's litigation interpretations in the brief on the merits in *Halon I*. That interpretation made no distinction between medical and nonmedical criteria. Rather, the Secretary, focusing solely on the "not . . . more restrictive" phrase in Section 402(f)(2), read the Section to allow the Department to apply standards that are less favorable than the HEW interim presumption to some claimants as long as they are more favorable than the HEW interim presumption to at least the same number of claimants. Brief of the Respondent, Director, O.W.C.P. at 17-19, *Halon I* (No. 82-3066). The Secretary has abandoned this interpretation entirely.

In his petition for rehearing in *Halon I*, the Secretary shifted to an entirely different interpretation of Section 402(f)(2), contending that the word "criteria" in the Section encompasses only "medical criteria." Petition for Rehearing on Behalf of the Director, O.W.C.P. at 2, 6-13, *Halon I* (No. 82-3066). That interpretation is the same as one of the formulations the Secretary advances to this Court. *See* n. 18 *supra*. But in neither the petition to rehear *Halon I* nor the subsequent petition to rehear *Halon II en banc* did the Secretary present the primary formulation she proffers here, that the

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mittee concluded its hearings. There is no indication that the DOL, after learning that the DOL presumption is more restrictive than the HEW presumption, informed the subcommittee of that fact.

word "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). Secy. Br. at 15, 22.

2. The clarity of the statutory language, the support the legislative history lends claimants' interpretation of Section 402(f)(2), the Secretary's obligation to give the benefit of any doubt to claimants when construing the Act, and the history of the Secretary's varying and inconsistent interpretations of that provision make deference to her latest interpretation inappropriate.

a. Deference to an administrative agency's construction of a statute is not appropriate unless a court, "employing traditional tools of statutory construction," determines that the statute is "silent or ambiguous." *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 and n. 9 (1984). However, for the reasons discussed in §§ B and C *supra*, the statute here is neither silent nor ambiguous with respect to the "criteria" to which Congress was referring in Section 402(f)(2).

b. Even if the statute here were silent or ambiguous, the Secretary's proffered interpretation would not be entitled to deference.

i. The Secretary claims that her position is entitled to deference because it is a "reasonable," or at least a "permissible," interpretation of the language of the statute. Secy. Br. at 14, 28. Although agency constructions are normally entitled to deference even if they are merely permissible ones, *Chevron U.S.A.*, 467 U.S. at 843-44, the legislative history of the 1978 amendments make the situation here special. For the committee report accompanying the bill that the Senate passed and sent to conference expressed the expectation that in interpreting the 1978 amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner." S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). The DOL, by regulation, has bound itself to comply with this congressional directive. § 718.3(c). But the Secretary violates that obligation here. Where more than one interpretation of the statute is possible,

the Secretary's assumed obligation to follow the directive requires her to adopt an interpretation that is favorable to claimants if it is reasonable. The black lung claimants' interpretation of Section 402(f)(2) is at least a reasonable one. Therefore, the Secretary should have adopted it.

ii. Nothing in the DOL's administrative record concerning Section 402(f)(2) discloses or explains the latest interpretation of the Section that the Secretary advances here. This also makes deference to her interpretation inappropriate. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n. 5 (1978). In her capacity as a party before this Court, the Secretary acknowledges that the HEW interim presumption does favor claimants in a way the Labor presumption does not. However, neither the Department's regulations nor the comments accompanying them even mention that this disparity exists, much less disclose the Department's current view that the disparity is legal, provide the reasons for this view, or disclose that the Department does not follow the construction of Section 402(f)(2) that it published at § 727.200. 43 Fed. Reg. 36824-26 (1978). The interpretation of Section 402(f)(2) that the Secretary offers here, and the reasons for it, are nothing more than "appellate counsel's post hoc rationalizations for agency action" that "the courts may not accept." *Motor Vehicle Mfrs. Assoc'n* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983).

iii. Deference is more readily accorded an agency's construction if that construction was contemporaneous with the enactment of the statute being construed and if the construction has been a consistent one. *NLRB* v. *United Food and Commercial Workers*, 108 S. Ct. 413, 421 n. 20 (1987). However, as explained at pp. 41-44 *supra*, the Secretary's current interpretation is neither contemporaneous nor consistent.

E. A Court May Direct The Secretary Of Labor To Apply The HEW Interim Presumption Because It Has Statutory Force And Effect

The private petitioners argue that even if the DOL interim presumption does not properly implement Section 402(f)(2), a

court cannot simply order the Secretary to apply the HEW interim presumption to the claims subject to the Section. Priv. Br. at 20 n. 30. Such an order, they contend, would violate the requirement that only the Secretary of Labor, not the courts, can issue regulations governing Part C claims, and then only after she complies with the requirements for rulemaking set out in the APA at 5 U.S.C. § 553. Priv. Br. at 20 n. 30 (*citing* 30 U.S.C. §§ 902(f)(1), 936(a)). According to the private petitioners, ordering the Secretary to apply the HEW interim presumption would violate these requirements because DOL did not choose to issue that presumption as a regulation. *Id.* They conclude that the proper course would be to remand the case to the Department for rulemaking. *Id.*

The argument is fallacious because it fails to recognize that with respect to the claims subject to Section 402(f)(2), the HEW interim presumption is not a "rule" at all. Congress incorporated the presumption in Section 402(f)(2) of the Act. By virtue of this incorporation, the presumption gained the force and effect of a statute and therefore is not subject to the rulemaking provisions of the APA. 5 U.S.C. §§ 551(1)(A), 551(4).

Consequently, in directing the Secretary to apply the HEW interim presumption to the claims subject to Section 402(f)(2), the courts of appeals did not, as the private petitioners suggest, usurp the Secretary's "authority to write an agency rule." Priv. Br. at 20 n. 30. Rather, they did what courts are supposed to do: they "interpret[ed] and *appl[ied]* statutory law." *Northwest Airlines* v. *Transport Workers*, 451 U.S. 77, 95 n. 34 (1981) (emphasis added). The private petitioners' position thus reduces itself to the remarkable contention that the courts lack the authority to instruct the Secretary to apply Congress' express statutory commands.[38]

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[38] Although the Secretary has not joined in this argument, the Benefits Review Board recently held that the Secretary could not apply the HEW interim presumption because she had not promul-

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

JULIAN N. HENRIQUES, JR.
ROBERT E. LEHRER*
Legal Assistance Foundation of Chicago
Suite 700, 343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

RAYMOND T. REOTT
JENNER & BLOCK
One IBM Plaza, 42nd Floor
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Respondents in No. 87-1095
Counsel of Record

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gated it as a regulation in accordance with the Black Lung Benefits Act and the APA. *Whiteman* v. *Boyle Land and Fuel Co.*, 11 Black Lung Rep. 1-99 (Ben. Rev. Bd. 1988) (*en banc*). Moreover, the Board extended the holding even to claims governed by the law of the circuits that decided *Halon*, *Coughlan*, *Kyle*, and *Broyles* because those courts did not address the issue. *Id.* Thus, the Board's decision in *Whiteman* forbids the Secretary from complying with these circuit court decisions unless she issues a regulation duly promulgated in accordance with the rulemaking requirements of the APA. The Secretary, however, has neither issued nor proposed any such regulation. If this Court determines that the claims subject to Section 402(f)(2) of the Act are entitled to the benefit of the more favorable invocation criterion included in the HEW interim presumption, it should ensure that compliance will be prompt by expressly rejecting the argument that the Secretary must first promulgate a regulation to bring about that result.